NO. 91-1522

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

WILLIAM J. HABERSTROH,
District Attorney of Blair
County, Pennsylvania, et al.,
Petitioners

v.

WAYNE PAUL BURKETT,
Respondent

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the Sixth Amendment's Speedy Trial Clause apply not only to delay before a criminal trial, when the defendant is presumed innocent, but also to proceedings after he has been found guilty?

2. May a court find a constitutional violation where the post-trial delay was neither intended to nor resulted in prejudice to the defendant's ability to proceed at sentencing or on appeal?

3. May a court remedy any such violation by directly reducing the defendant's sentence in proportion to the length of the delay?

LIST OF PARTIES

This case began in federal district court as a habeas corpus action by Wayne Paul Burkett, the prisoner, against Thomas A. Fulcomer, the then state prison superintendent, the Attorney General of Pennsylvania, and the District Attorney of Blair County. The prison superintendent is now William Love. The District Attorney of Blair County has been the sole answering respondent throughout.

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PETITION FOR WRIT OF CERTIORARI
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FOR THE THIRD CIRCUIT

Petitioner, District Attorney of Blair County, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered on December 20, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 951 F.2d 1431, and is reprinted in the appendix at App. 1-83. The order of the United States District Court for the Western District of Pennsylvania is reprinted in the appendix at App. 119-20. The report and recommendation and supplemental report and recommendation of the United States Magistrate are reprinted in the appendix at App. 84-97 and App. 98-118.

STATEMENT OF JURISDICTION

Invoking jurisdiction under 18 U.S.C. § 2254, respondent brought this habeas corpus action in the Western District of Pennsylvania. On December 27, 1990, the Western District dismissed the habeas corpus petition.

On December 20, 1991, a Third Circuit panel entered a judgment and opinion reversing the Western District's order and reducing respondent's state sentence by thirty-nine months. Following issuance of its mandate initially, the Third Circuit recalled the mandate and stayed reissuance pending filing of and decision on this petition.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Speedy Trial Clause of the Sixth Amendment to the United States Constitution, which provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial.

The Due Process Clause of Section 1 of the Fourteenth Amendment to the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

Respondent committed a string of rape and burglaries against three women in Blair County, Pennsylvania. The last offense occurred while respondent was out on bail following his conviction for the first two crimes. Respondent was found guilty in the third trial as well, and the conviction was upheld through all state and federal appeals. The Third Circuit, however, then resentenced respondent, reducing his prison term by over three years, on the ground that proceedings following the guilty verdict had been delayed by that amount of time. The court held that it had the authority to do so because delays before

sentencing and on appeal violate the Speedy Trial and Due Process Clauses, regardless of whether the delay is intended to or does in fact prejudice the defendant in those proceedings.

The crime here occurred in April, 1982. Respondent had been convicted of his earlier offenses at trials held the previous November and January.[1] He had been unable to post bond while awaiting those trials, and bail was not revoked following the convictions. By March, 1982, however, respondent managed to produce the necessary collateral, and he was released pending sentence. 3d Cir. App. 1277-94, 1494-95, 1499, 1583-87.

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[1]At the first trial, at Blair County Criminal Action Nos. 140-41 of 1981, respondent was convicted of burglary, terroristic threats, corruption of minors, and theft. The jury did not reach a verdict on the rape charge. At the second trial, at No. 161 of 1981, respondent was convicted of rape, burglary, involuntary deviate sexual intercourse, aggravated assault, and related offenses.

Six weeks later, on Easter Sunday, the fifty-four-year-old victim heard a strange noise at her door at 11:00 p.m. When she approached the door, a man, whom she did not know, forced it open. He then sat down in the easy chair, lit a cigarette, and instructed the victim to bring him a drink. The man grabbed the woman's hand and demanded that she engage in various sex acts with him. The victim broke free and ran for the back door, but the man chased her through the house. Eventually, he caught her, produced a knife, and stated, "I'm going to slit your goddam throat." He then began unzipping his pants. Before he could act further, however, the victim again attempted to escape, this time successfully fleeing her home. She had been in the assailant's presence for almost half an hour, during most of which she could see his face. 3d Cir. App. 64-75.

The victim immediately reported the crime to police, who searched the area. Within ten minutes of the incident, however, they could find no one on the street. The woman described her attacker as approximately twenty to twenty-five years old, 5'3" to 5'4" tall, 140 pounds, brown hair, "little squinty brown eyes I always see," and facial hair. Respondent was twenty-one years old, 5'6" tall, 153 pounds, with brown hair and eyes, and a beard. At the time of the crime, he had been staying at a house within a three to four minute walk from the victim's home. 3d Cir. App. 76, 92, 131-32, 170-71, 174.

Police prepared an array of eight photographs the next day. The victim picked out respondent's picture, and he was arrested. At the trial in January 1983, at Blair County Criminal Action No. 284 of 1982, respondent presented alibi witnesses; he claimed that he could not have been the

perpetrator, because his beard was fuller than the victim had described. The jury credited the victim's testimony over defendant's evidence, and returned guilty verdicts for attempted rape, burglary, terroristic threats, simple assault, and recklessly endangering another person. 3d Cir. App. 77-79, 167-70, 178-82, 192-95, 208-12, 255, 1190-91.

Defense counsel promptly filed post-trial motions, requesting the trial judge to grant a new trial or arrest of judgment. Disposition of the motions, however, which precede sentencing under Pennsylvania practice, was delayed due to overcrowded court dockets in the county. Although in a rural area, Blair County had experienced a growing backlog by the early 1980's, and the small number of judges authorized for the county court had not kept pace. Allotment of judges could be changed only by an act

of the state legislature. 3d Cir. App. 1515-16, 1534, 1536, 1538, 1541.

Respondent, meanwhile, began a letter-writing campaign to his lawyer, the judge, the court clerk, the legislature, the state attorney disciplinary board, and the 60 Minutes television show. Respondent also filed numerous pro se motions. 3d Cir. App. 1605-1880. Despite respondent's protests, however, the resources of the county court were primarily devoted during this period of backlog to trials of accused persons who had not yet received an adjudication of guilt or innocence. This trial backlog, in addition to occupying judges, also tied up the county's court reporters, slowing production of transcripts from prior trials. 3d Cir. App. 1515-18, 1527-28.

By January 1985, the transcripts from respondent's trial had finally been prepared and the judge's calendar allowed for

a hearing on post-trial motions. At the hearing, however, respondent refused to proceed. He insisted that no further proceedings should be held until the court disposed of his previous written request for replacement of his court-appointed trial counsel, against whom his primary complaint was that counsel had not done enough to expedite the scheduling of post-trial proceedings.

The court explained that, if delay was respondent's concern, he should allow the present hearing to go forward, because the demand for new counsel would require the scheduling of additional hearings, and would only postpone the ultimate disposition of the case. After extended discussion, however, respondent persisted, and the court acquiesced in his desire to halt the proceeding. 3d Cir. App. 265-72.

In April 1985, following another hearing, the court determined that respondent

was not entitled to new counsel. The court then heard argument on the post-trial motions, which were denied, and scheduled sentencing. In June 1985, respondent was sentenced to a total of sixteen to thirty-two years in prison.[2] 3d Cir. App. 274, 282, 318-21.

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[2]Pennsylvania has a minimum/maximum system of sentencing. The minimum term represents the presumptive point at which the prisoner will be paroled, absent bad behavior, and the maximum term is the end of the period of parole. See 42 Pa. Cons. Stat. Ann. § 9756.

State law further provides that sentences with maximum terms over five years, like respondent's, must be served in a state prison rather than a county jail. 42 Pa. Cons. Stat. Ann. § 9762. Accordingly, respondent was transferred to a state prison following his sentencing.

Respondent did not spend all the time before sentencing in Blair County jail, however. He was incarcerated during some of that period in adjoining counties, including Cambria County, where he faced prosecution for perjury. He was convicted of that charge in July 1985, shortly after sentencing in this case. See Commonwealth v. Burkett, 352 Pa. Super. 350, 507 A.2d 1266 (1986).

Trial counsel filed a timely direct appeal to the intermediate state appellate court, the Pennsylvania Superior Court. When the county court was able to complete preparation of the record, in December 1985, it was sent to the Superior Court. Although the trial judge had not yet written an opinion, the Superior Court was not required to wait for one before proceeding with the appeal, and instead promptly issued an appellate briefing schedule in January 1986. Trial counsel filed a brief for appellant in February 1986. Having preserved respondent's right to appeal, and in the face of respondent's continued complaints about him, counsel was then allowed to withdraw by the appellate court, and the case was remanded to the lower court for appointment of new counsel. 3d Cir. App. 349, 607, 687-89, 1274.

New counsel was appointed in April 1986. He requested permission to prepare

a new brief for appellant. The brief, seventy pages long, was filed in August 1986, and included every legal issue that respondent wanted raised. Nonetheless, respondent immediately petitioned the court to remove his new counsel. His complaint this time was that the format of the brief was not up to standard. The court declined to remove new counsel, instead allowing him to redact his brief to meet respondent's complaints. The amended new brief was filed in November 1986. 3d Cir. App. 350, 445-47, 692, 769, 807-14, 842, 1274-75.

In January 1987, the court issued a judgment and memorandum opinion denying respondent's claims and affirming the judgment of sentence. Counsel filed a petition for allowance of discretionary appeal to the Pennsylvania Supreme Court. That court denied review in December 1987. 3d Cir. App. 927-42, 992.

In the meantime, however, respondent, unsatisfied with his treatment in the state courts, had also been proceeding in federal court. In 1985, while post-trial motions and sentencing were still pending in the state trial court, he filed a federal habeas corpus petition in the Western District of Pennsylvania at Civil Action No. 85-769. The district court followed the recommendation of the magistrate to dismiss the petition if sentencing occurred within sixty days. 3d Cir. App. 2107-16. Defendant was in fact sentenced during that period. The Third Circuit subsequently denied a certificate of probable cause to appeal the district court's order.

Respondent, however, then filed new federal habeas corpus petitions seeking outright discharge on all three of his state court convictions. Civil Action Nos. 85-1965-66. The District Court adopted the magistrate's recommendation to dismiss on

exhaustion grounds, 3d Cir. App. 2117-22, but the Third Circuit granted a certificate of probable cause to appeal. In its ruling, the Third Circuit dismissed for want of exhaustion as to the conviction presently at issue, since respondent was still pursuing his direct appeal on that case in the state courts. Burkett v. Cunningham, 826 F.2d 1208 (3d Cir. 1987).[3]

Promptly after the completion of the direct appeal process, respondent was back in federal court with a new habeas petition in January 1988. Civil Action No. 88-01397. This petition raised not only the issue of delay, but all the claims of trial error respondent had presented to the state courts. Once again, the district court, agreeing with the magistrate, dismissed the petition; once again, the Third Circuit

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[3]Defendant eventually received the relief of a discharge of both of his other Blair County convictions. App. 13-14.

granted a certificate of probable cause. App. 22, 84-120.

In its subsequent opinion, the Court of Appeals held that the assumption made arguendo in Pollard v. United States, 352 U.S. 354 (1957) -- that the Speedy Trial Clause applies to sentencing -- had ripened into binding law as of the Third Circuit's prior Burkett decision. The court further held, as in the prior Burkett decision, that, where the Speedy Trial Clause left off at sentencing, the Due Process Clause picked up to cover any appellate delay, and that precisely the same legal standard governed in both contexts -- that set forth in Barker v. Wingo, 407 U.S. 514 (1972). App. 23-27, 59-60.

In applying this standard, the Third Circuit panel majority held that respondent was not at all responsible for any delay in this case, and that all delay, however inadvertent, weighed against the state.

The majority also concluded that respondent had been prejudiced by delay in three ways: 1) he said that he was anxious about exactly what sentence he would receive and did not eat or sleep well; 2) he said that he preferred the rehabilitation and visitation privileges in the state prison to those in the county jail, where he had been until sentencing; and 3) he said his memory would be impaired in the event of a retrial. App. 30-61. In a separate section of its opinion, the court then denied all respondent's claims seeking a retrial. App. 68-73.

As for relief for the speedy trial and due process violations it found, the majority stated that it was "convinced" that the prejudice described above would be cured by cutting down respondent's sentence by thirty-nine months, the amount of delay it had calculated. While recognizing the "imprecision" of this remedy, the majority

maintained that it was entitled to order such relief by virtue of its authority to fashion a judgment under the habeas corpus statute. App. 61-68.

Judge Alito dissented. He observed that there was no constitutional violation, because the delay was not solely the responsibility of the state, and none of the factors identified by the majority established prejudice. App. 76-82. And regarding the majority's remedy, he concluded, it was simply anomalous to alter respondent's sentence in proportion to "delay that has apparently had no impact whatsoever on the sentence imposed, the amount of time he will spend in custody, or the disposition of his appeal." App. 82.

Petitioner, after securing the recall and stay of the Third Circuit mandate, then filed this certiorari petition.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD FINALLY DETERMINE THE QUESTION -- LEFT OPEN THIRTY-FIVE YEARS AGO AND NOW CREATING CONFLICTS AMONG THE STATE AND LOWER FEDERAL COURTS -- OF WHETHER THE SPEEDY TRIAL CLAUSE APPLIES TO PROCEEDINGS AFTER TRIAL.

In Pollard v. United States, 352 U.S. 354 (1957), this Court acknowledged but did not answer the question of whether the rights guaranteed by the Speedy Trial Clause extend beyond the trial to proceedings after the presumption of innocence has been extinguished by a finding of guilt. Over the three and a half decades since, and particularly in recent years, scores of state and federal courts have been faced with claims arising out of, but without guidance from, the Pollard decision. This vacuum has engendered an unsatisfactory conflict of results and default of analysis that should now be addressed.

In Pollard, the total discussion of the application of the Speedy Trial Clause to post-verdict delay consisted of the following: "We will assume arguendo that sentence is part of the trial for purposes of the Sixth Amendment." 352 U.S. at 361. There was no examination of textual or policy considerations that might lead to a future resolution of the issue; it was not necessary to do so to decide the case at hand. The Court could not have foreseen that this simple assumption, briefly stated for purposes of argument, would take on legal life of its own.

Since Pollard, however, the large majority of federal courts of appeals have mechanically applied this assumption in post-trial delay cases.[4] A few circuits,

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[4] E.g., Katz v. King, 627 F.2d 568 (1st Cir. 1980); United States v. Tortorello, 391 F.2d 587 (2d Cir. 1968); United States v. Campisi, 583 F.2d 692 (3d Cir. 1978); Brady v. Superintendent, Anne Arundel County Detention Center, 443 F.2d 1307 (continued...)

including the Third (here and in respondent's previous appeal), have gone further, stating affirmatively that post-trial delay is covered by the Speedy Trial Clause. But they have reached this conclusion only by incorrectly citing Pollard for the proposition, or by citing earlier cases that, in turn, incorrectly cited Pollard.[5] None of

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[4](...continued)
(4th Cir. 1971); United States v. Campbell, 531 F.2d 1333 (5th Cir. 1976), cert. denied, 434 U.S. 851 (1977); United States v. Reese, 568 F.2d 1246 (6th Cir. 1977); United States v. Merrival, 600 F.2d 717 (8th Cir. 1979); Tinghitella v. State of California, 718 F.2d 308 (9th Cir. 1983); Perez v. Sullivan, 793 F.2d 249 (10th Cir.), cert. denied, 479 U.S. 931 (1986).

[5]The only court of appeals opinions that have asserted a definitive Sixth Amendment speedy sentencing right are in the Third Circuit, Burkett v. Cunningham, 826 F.2d 1208, 1220 (3d Cir. 1987) (respondent's previous appeal); Burkett v. Fulcomer, App. 23-24 (respondent's present appeal), and the Fifth Circuit, Juarez-Casares v. United States, 496 F.2d 190, 192 (5th Cir. 1974); United States v. Campbell, 531 F.2d 1333, 1335 (5th Cir. 1976), cert. denied, 434 U.S. 851 (1977); United States v. Howard, 577 F.2d 269, 270 (5th Cir. 1978).

(continued...)

the federal courts of appeals have delved behind the Pollard assumption, even in cases where relief has been granted.[6]

The state courts have been somewhat more independent-minded in this area. Many have, like the federal courts, simply

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[5](...continued)
Juarez-Casares relied on Pollard for this proposition. Campbell also relied on Pollard. Howard relied on Pollard and on Campbell.

Burkett v. Fulcomer relied on Burkett v. Cunningham. Burkett v. Cunningham relied on Juarez-Casares, Campbell, and Howard. It also cited United States v. Reese, 568 F.2d 1246 (6th Cir. 1977), United States v. Merrival, 600 F.2d 717 (8th Cir. 1979), and Tinghitella v. State of California, 718 F.2d 308 (9th Cir. 1983). Those cases, however, like Pollard itself, merely assumed without establishing a speedy sentencing right. Reese, 568 F.2d at 1253; Merrival, 600 F.2d at 720; Tinghitella, 718 F.2d at 312-13 ("The Supreme Court has not expressly decided whether the right to a speedy trial encompasses the sentence phase [citing Pollard]"; "Following the assumption in Pollard ..."; "Even were we to conclude that sentencing is included within the speedy trial guarantee ..."; "whatever its extent, the speedy trial guarantee ...").

[6]Burkett v. Cunningham; Burkett v. Fulcomer; Juarez-Casares.

perpetuated the Pollard assumption without further analysis.[7] Many others, however, have rejected the idea that the

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[7] E.g., Hurst v. State, 516 So. 2d 904 (Ala. App. 1987); Noe v. State, 391 So. 2d 151 (Ala. App. 1980); Scaloni v. State, 383 So. 2d 586 (Ala. App. 1980); Travelstead v. State, 689 P.2d 494 (Alaska App. 1984); Gonzales v. State, 582 P.2d 630 (Alaska 1978); Key v. State, 463 A.2d 633 (Del. Sup. 1983); Johnson v. State, 305 A.2d 622 (Del. Sup.), cert. dismissed, 413 U.S. 901 (1973); Erbe v. State, 276 Md. 541, 350 A.2d 640 (1976); Commonwealth v. Bianco, 390 Mass. 254, 454 N.E.2d 901 (1983); People v. Garvin, 159 Mich. App. 38, 406 N.W.2d 469, appeal denied, 428 Mich. 909 (1987); Trotter v. State, 554 So. 2d 313 (Miss. 1989); Yates v. State, 342 So. 2d 312 (Miss. 1977); State ex rel. McLellan v. Cavanaugh, 127 N.H. 33, 498 A.2d 735 (1985); State v. Le Furge, 222 N.J. Super. 92, 535 A.2d 1015, certif. denied, 111 N.J. 568, 546 A.2d 498 (1988); People v. Harper, 137 Misc. 2d 357, 520 N.Y.S.2d 892 (1987); State v. Avery, 95 N.C. App. 572, 383 S.E. 2d 224 (1989), appeal dismissed, 326 N.C. 51, 389 S.E.2d 96 (1990); Commonwealth v. Glover, 500 Pa. 524, 458 A.2d 935 (1983); Commonwealth v. Pounds, 490 Pa. 621, 417 A.2d 597 (1980); Commonwealth v. Andrews, 391 Pa. Super. 363, 571 A.2d 410 (1990); State v. Johnson, 100 Wash. 2d 607, 674 P.2d 145 (1983); State v. Braithwaite, 34 Wash. App. 715, 667 P.2d 82 (1983); State v. Sims, 14 Wash. App. 277, 539 P.2d 863 (1975), review denied, 86 Wash. 2d 1010 (1976); Despain v. State, 774 P.2d 77 (Wyo. 1989).

constitutional speedy trial guarantee extends beyond the end of trial.[8]

The resulting state of the law is far from satisfactory. The cases that apply the Speedy Trial Clause in the post-trial context do so without any basis; the cases that limit the guarantee to trials create a split of authority leading to unequal justice.

This situation is all the more unacceptable in light of the poverty of any reasoning in favor of converting the Pollard assumption into constitutional law. Surely the place to begin, if not end, the

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[8] E.g., State v. Steelman, 126 Ariz. 19, 612 P.2d 475, cert. denied, 449 U.S. 913 (1980); State v. Drake, 259 N.W.2d 862 (Iowa 1977); State v. Freeman, 236 Kan. 274, 689 P.2d 885 (1984); State v. Johnson, 363 So. 2d 458 (La. 1978); State v. Jameson, 224 Neb. 38, 395 N.W.2d 744 (1986); State v. Custer, 240 Or. 350, 401 P.2d 402 (1965); State v. Adkins, 725 S.W. 2d 660 (Tenn.) (no speedy appellate right), cert. denied, 482 U.S. 909 (1987); Easley v. State, 564 S.W.2d 742 (Tex. Crim. 1978), cert. denied, 439 U.S. 967 (1978); Ramos v. State, 486 S.W.2d 297 (Tex. Crim. 1972).

inquiry is with the text of the provision in question. The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy ... trial." The word "prosecution" contrasts with the word "trial," which is only part of a prosecution. A trial ends with a verdict. The word "trial," in plain meaning, simply does not encompass sentencing and other post-verdict proceedings.[9]

This sense of the word "trial" has been employed in particular in the speedy trial context. The Federal Speedy Trial Act, 18 U.S.C. §§ 3161-74, governs solely the period until commencement of trial, and says nothing about proceedings after

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[9]"[I]n its strict definition, the word 'trial' in criminal procedure means the proceedings in open court after the pleadings are finished and the prosecution is otherwise ready, down to and including the rendition of the verdict." Black's Law Dictionary 1675 (4th ed. 1951), citing Thomas v. Mills, 117 Ohio St. 114, 157 N.E. 488 (1927).

verdict.[10] The same is true of the American Bar Association's standards relating to speedy trial.[11] Yet, despite this, virtually none of the cases purporting to find a Sixth Amendment right of speedy trial beyond verdict have even discussed the scope of "trial"; to the extent the concept is mentioned at all, the analysis simply traces back to Pollard.[12]

Nor is there any policy basis for automatically expanding the Speedy Trial

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[10] More generally, the Federal Rules of Criminal Procedure also distinguish between trial and sentencing. Part VI of the rules, entitled "Trial," ends with Rule 31, "Verdict." Part VII of the rules, entitled "Judgment," begins with Rule 32, "Sentence and Judgment."

[11] ABA Standards for Criminal Justice ch. 12, Speedy Trial (1986). See also Shelvin Singer and Marshall J. Hartman, Constitutional Criminal Procedure Handbook ch. 14, Speedy Trial, § 14.1 at 499 (1986) ("In general, the speedy trial provision addresses that period which is usually designated as adjudicatory, that is, the time between the arrest or charge, whichever occurs first, and the commencement of trial") (emphasis in original).

[12] Tinghitella, 718 F.2d at 311.

Clause to post-verdict proceedings. It is true that delay can be a bad thing before or after verdict -- or, indeed, at any stage of criminal process. That, however, is hardly sufficient to resolve the issue of where Speedy Trial Clause rights end, just as it was not sufficient to determine where they begin. United States v. Marion, 404 U.S. 307 (1971) (declining to extend Speedy Trial Clause to pre-accusation delay; the "possibility of prejudice ... is not itself sufficient reason to wrench the Sixth Amendment from its proper context").

The fact is that, for many courts, the Pollard assumption has itself assumed the power of law by mere process of accretion. That is not the way constitutional doctrine should be made. It is appropriate for this Court, after argument and deliberation, to determine the true scope of the Speedy Trial Clause guarantee.

II. **THE COURT SHOULD ALSO RESOLVE THE IMPORTANT COLLATERAL ISSUES PRESENTED BY THIS CASE:**

A) **WHETHER A CONSTITUTIONAL VIOLATION MAY BE FOUND WHERE THE POST-TRIAL DELAY WAS NEITHER INTENDED TO NOR RESULTED IN PREJUDICE TO THE DEFENDANT AT THE POST-TRIAL STAGE; AND**

B) **WHETHER A CONSTITUTIONAL PENALTY MAY BE IMPOSED BY REDUCING THE DEFENDANT'S SENTENCE IN RELATION TO THE LENGTH OF ANY POST-TRIAL DELAY.**

The Third Circuit held that, to whatever extent the Speedy Trial Clause does not entitle a convicted defendant to claim delay in proceedings after verdict, the Due Process Clause does provide such a right. The labels, according to the court, are essentially interchangeable. In the Third Circuit's thinking, any delay -- whether before trial, pending sentence, or, indeed, at any point on direct appeal -- must be assessed in the manner established in Barker v. Wingo, 407 U.S. 514 (1972).

This case, however, provides ample illustration of the distortions that result from such an approach. It may well be that loose concepts of due process, if not speedy trials, provide a safety net for those truly harmed by purposeful governmental delay after verdict. But, whatever constitutional provision is invoked, this Court -- mindful of the fundamental difference between accused persons awaiting trial and convicted criminals -- should set forth appropriately tailored parameters for gauging and remedying such claims.

Here, in measuring prejudice, the Third Circuit utterly failed to come to grips with that difference. The panel majority found that respondent had suffered three kinds of prejudice pending sentence and appeal: anxiety about not knowing his exact sentence; deprivation of visitation and rehabilitation privileges; and loss of memory in the event of a retrial. None of

these should have any place in determining whether post-verdict delay violated the constitution.

Respondent's assertion of "anxiety" is bogus. The panel majority felt that it was bound to give the claim constitutional weight because the testimony of respondent (a convicted perjurer), that he did not eat or sleep well, was "uncontradicted." App. 52, 65. It is difficult to imagine, however, how the state was supposed to present contrary evidence on such self-serving, subjective assessments. Moreover, respondent's own relatives contradicted his claims. They did testify, at the evidentiary hearing before the federal magistrate, that respondent appeared "distressed" after his conviction. But they admitted that he appeared no more distressed then than he did at the time of the hearing -- five years after his sentencing -- because he was upset about having to

be in prison at all. 3d Cir. App. 1370, 1379-82, 1387-88, 1393, 1396-98.

This is the nub of the Third Circuit's problem in dealing with post-verdict proceedings. The fact is that prisons and sentences are distressing things; they are supposed to be. That is why we have them. Before trial, when the accused is presumed innocent, anxiety about such consequences is an unfortunate incident of the criminal process, and should be minimized; after trial, however, when the accused is determined guilty, it is the intended effect. Once respondent had been convicted of three separate violent felonies, he faced a total of over five decades in prison. He could not possibly have expected to receive probation for this crime spree, or even a jail term shorter than the relatively brief time he spent awaiting sentence.[13] It is

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[13]Respondent maintains that his sentence was "excessive" and "retaliatory," (continued...)

[13](...continued)
because he should have been treated as a "first offender" entitled to leniency. Obviously, however, respondent was no first offender: at the time of this crime, he had just been convicted of two similar offenses and was out on bail. His insistence on disregarding those two convictions is apparently based on the fact that sentence had not yet been imposed on them when he was sentenced in this case. As a result, he appears to believe that the trial judge was legally required to pretend that, but for this one transgression, respondent was an upstanding citizen.

Pennsylvania law provides no support whatever for this position. E.g., Commonwealth v. Thomas, 335 Pa. Super. 99, 483 A.2d 974 (1984) (in exercising sentencing discretion, judge may consider other convictions whether or not sentence has been imposed).

Respondent also complains because the sentencing judge did not award him credit for time served awaiting sentence. This claim too is empty. At the time of sentencing, a defendant is entitled to credit toward the minimum and maximum term for time served on the offense in question. 42 Pa. Cons. Stat. Ann. § 9760(1). Respondent, however, was incarcerated by virtue of his two previous convictions; accordingly, he was not entitled to any credit at the time of sentencing for this offense. Subsequently, those two convictions were reversed, see n.3, supra, and at that point, pursuant to § 9760(3), respondent did receive credit in the present case for all time he served before trial and

(continued...)

ludicrous that whatever anxiety a convicted criminal may feel in such circumstances should count as credit toward a constitutional claim.

Respondent's alleged concern with visitation privileges and rehabilitation programs is no more compelling. He maintained that inmates and visitors are allowed less contact at the county jail than at the state prison, to which he was sent only after sentencing. His relatives testified, however, that they seldom if ever visited him at the state institution, which was considerably further away than the Blair County jail; whereas he received regular visits every week or two when he was still in the local facility. As for "rehabilitation," important as respondent now says that is to him, he did not bother

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[13](...continued)
sentencing. 3d Cir. App. 1459, 1499-1502, 1583-87. The bottom line is that respondent did not spend any extra time in jail as a result of delay in sentencing.

to mention this claim in his habeas petition, even though it contained detailed lists of alleged prejudice. 3d Cir. App. 490-91, 534-39.

Perhaps most absurd is the finding of prejudice from loss of memory at retrial. Respondent is not having a retrial. Every claim of trial error he has raised in pursuit of that goal has been rejected -- by the trial court, by the state appeals courts, by the federal magistrate and district judge, and, indeed, by the Third Circuit itself. The panel majority's insistence that respondent was nonetheless prejudiced in this regard apparently reflects its reluctance to view the criminal verdict with any finality.

It is understandable, considering the resources devoted to re-examining convictions on post-verdict motions, on direct appeal, on state collateral appeal, and on federal habeas review, that trials

themselves might come to be viewed as mere preliminary skirmishes. That tendency, however, should be resisted, not indulged, when assessing claims of constitutional prejudice from post-trial delay. There is simply no basis to believe at this point that respondent will ever be retried for this offense, and his purported inability to testify from memory at such a proceeding is utterly irrelevant. The only kind of prejudice that should weigh in favor of relief for delay in post-verdict proceedings is, as Judge Alito stated, that which "unconstitutionally tainted the outcome of the post-verdict proceedings." App. 83.

The Third Circuit's treatment of the reason for the delay also warrants review. That court held that delay from overcrowded dockets counted just as heavily against the state in the post-trial context as in the pre-trial context. That cannot be; it cannot be that the Constitution requires a

short-strapped county to devote as much of its limited judicial resources to disposing of already tried matters as it does to adjudicating the cases of those still presumed innocent.

Moreover, respondent himself clearly added to the delay by his habit of seeking replacement of all his lawyers.[14] This was especially apparent at the appellate stage. There, although the trial judge had not filed an opinion, the superior court nonetheless proceeded with the scheduling of the case; yet, at respondent's insistence, the appeal was then delayed while two different attorneys represented him and three different briefs were filed on his behalf.[15]

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[14]See also Commonwealth v. Burkett, 352 Pa. Super. 350, 507 A.2d 1266 (1986) (noting numerous pro se filings and challenges to appointed counsel in respondent's unrelated perjury case).

[15]Respondent argues that his own dilatoriness during the appeal should not

(continued...)

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[15](...continued)
count against him, because the superior court would have had to wait for the trial judge's opinion anyway. Much of respondent's delaying conduct concerning his attorneys, however, took place even after the trial judge's opinion was filed in July 1986. Respondent certainly had the right to challenge the effectiveness of his lawyers; but he did not have the right to convert those ineffective assistance challenges into claims of unconstitutional delay merely by virtue of the time required to litigate them.

Moreover, the Pennsylvania appellate courts frequently resolve appeals without waiting for an opinion from the lower court where such an opinion is not essential for appellate review. E.g., Commonwealth v. Newman, 598 A.2d 275, 276 n.1 (Pa. 1991) and 279 (Papadakos, J., concurring) ("although the trial court wrote no opinion, we, and the intermediate appellate court, had no difficulty in reviewing the record and reaching a proper conclusion. In my view, the need of opinions, generally, from trial courts is an anachronism"); Malis v. Zinman, 436 Pa. 592, 594 n.1, 261 A.2d 875, 876 n.1 (1970) (noting denial of appellant's request to delay appeal pending filing of lower court opinion); Commonwealth v. Rooney, 296 Pa. Super. 288, 296, 442 A.2d 773, 777 (1982) (resolving merits of appeal despite noting that an opinion from trial court would have been helpful); DeVeaux v. Palmer, 125 Pa. Commw. 631, 558 A.2d 166, 169 (1989) (noting that, although trial court failed to file opinion, reviewing court could affirm on any ground). Here, for example, the
(continued...)

Delay for such reasons simply should not be a factor. As in the pre-accusation setting, delays after conviction should not entitle a defendant to challenge his otherwise proper judgment of sentence absent an intent by the state to gain a tactical advantage. Such conduct, unlike the kind of holdups that occurred here, could rationally support a claim of cognizable prejudice.

Finally, the form of relief granted here further demonstrates the difficulties of constitutionalizing complaints over post-trial delays. The Third Circuit concluded that the prejudice it had identified could be remedied simply by reducing respondent's sentence by the amount of delay it had calculated. This was not simple, but simplistic. For example, the

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[15](...continued)
superior court made no reference at all to the lower court's opinion in its own disposition of the case, even though the opinion had been filed several months previously.

"anxiety" and "visitation/rehabilitation" prejudice found by the court clearly ceased after sentencing, but the panel nonetheless included post-sentencing appellate delay in reducing respondent's sentence. And it is unclear why the "loss of memory" prejudice relates in any manner to a reduction of sentence.

The problem here is that there is simply no one-to-one correspondence between the kind of prejudice respondent alleged and the length of the sentence respondent justly received. As the dissenting judge recognized, it will never be possible to alter a convict's judgment of sentence in a rational manner based on "prejudice" that in no way affected the disposition of the sentencing or other post-trial proceedings. What the Third Circuit imposed was not a remedy for the respondent but a penalty against the state.

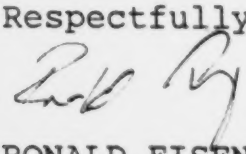
Such a penalty is not only unjustified here, but unnecessary in general. The observations of the dissenting judge in this regard are worth note. App. 82-83. He pointed out that, to the extent due process entitles a federal habeas court to intervene in pre-sentencing delay, the court can simply issue a conditional writ provisioned on imposition of sentence within a specified period, as was done in this very case. For post-sentencing appellate delay, the court can invoke already established principles excusing prisoners from exhaustion requirements.

However these questions are to be resolved, it is clear that this case presents several significant and recurring issues concerning constitutional claims of post-trial delay. This Court's review is required.

CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,



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